No. 93-1439

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALEXANDER HOSKINS, individually and in his official capacity as the Commissioner of the Philadelphia Streets Department,

Petitioner,

v.

ELIZABETH KINNEY; GLENN NIMAN; DANIEL C. SULLIVAN; DIANE FATULA; CASSIE JAMES; ERIK VON SCHMETTERLING; JOHN GLADSTONE; TOM LEVINE; CHARLES HOMILLER; RONA SCHNALL; MARY BARNES; ANN MCLAUGHLIN; DISABLED IN ACTION OF PENNSYLVANIA, individually and on behalf of all others similarly situated,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF AMICUS CURIAE THE UNITED STATES CONFERENCE OF MAYORS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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BRIEF OF AMICUS CURIAE THE UNITED STATES CONFERENCE OF MAYORS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Amicus Curiae, The United States Conference of Mayors, respectfully files this brief, pursuant to Rule 37 of this Court, and with the consent of the parties below, in support of the petition for a writ of certiorari. This case is of exceptional importance because the decision below: (1) implicates traditional notions of federalism and state sovereignty which are subject to constitutional protections, and (2) unduly interferes with the States' ability to function as States

and "commandeers the States to act as agents of the federal government."

INTEREST OF AMICUS CURIAE

The United States Conference of Mayors ("USCM") is a national organization representing hundreds of this nation's civic leaders. "The [USCM] is the official nonpartisan organization of cities with populations of 30,000 or more. There are about 1,050 such cities in the country today." The United States Conference of Mayors, *The Mayors of America's Principal Cities* (1993). The USCM was organized, in part, to provide mayors with a unifying voice in the face of an ever-burgeoning federal government. In its constitution, the USCM has recognized that among "[t]he purpose[s] of this organization . . . shall be . . . the safeguarding of the interests, rights and privileges of municipalities as they may be affected by legislation."

STATEMENT UNDER RULE 29.4(b)

Since the appellate court's decision draws into question the constitutionality of 28 C.F.R. § 35.151(e)(1) (1993), 28 U.S.C. § 2403(a) (1988) may apply. No United States court has, pursuant to 28 U.S.C. § 2403(a), certified this issue to the Attorney General.

REASONS FOR GRANTING THE WRIT

The impact of the Americans with Disabilities Act ("ADA" or the "Act"), as well as other unfunded federal mandates, on this nation's cities and states has been staggering. Since 1980, 27 new mandates have become law. Tom Diemer, "States Take Dim View of D.C.'s Bright Ideas," *The Plain Dealer*, Feb. 6, 1994, at 4A. Many of these mandates are unfunded

. . . and extremely costly. According to a Price Waterhouse study surveying more than 300 of this nation's cities, implementation of 10 selected unfunded federal mandates cost cities more than six and one-half billion dollars last year. Price Waterhouse, *Impact of Unfunded Federal Mandates on U.S. Cities* (the "Price Waterhouse Study") (Oct. 26, 1993), at 2. "Directives from Washington gobble up 12% of county revenues nationwide and nearly the same percentage of city-collected taxes." *See* Diemer, *supra.*

The staggering costs of these mandates have put additional strains on already tight local budgets. As Philadelphia Mayor Ed Rendell recently noted, the cities are currently "being robbed of [their] ability to do the things that are smart and [to] make [their] own priorities." Kevin McCarty, "Rendell Pushes Senate to Adopt Kempthorne-Condit Bill," *U.S. Mayor*, Nov. 15, 1993, at 1. Implementation of the ADA's regulations has had the same impact. Implementation of the ADA regulations cost cities more than $350 million last year. Price Waterhouse Study at 4.

The Congressional mandate requiring the installation of curb ramps has been particularly costly. In the City of Philadelphia, it will cost local taxpayers an estimated $130 million to $140 million to install curb ramps. Matthew Purdy "Rendell and Other Mayors Tell D.C.: Put Up, or Shut Up," *Philadelplhia Inquirer*, Oct. 28, 1993, at B3. Cutting curb ramps will cost an estimated $1,000 to $2,000 per curb; for a six-county area, it will be an overall total of $20 million. Martin Pflieger, "Curbs Are Becoming Handicap Friendly," *The Morning Call*, July 14, 1993, at B3.

Despite this tremendous cost, administrators across the country have indicated their willingness to help the disabled and to implement the ADA's mandates. As one civic leader recently noted with regard to the curb ramp mandate, "[e]veryone wants to comply . . . [b]ut for some this is going to be a very expensive venture . . . [i]t's not that most people don't think it's a good idea, it's just that it can be very costly." Rob Thomas & Steve Ostrowski, "Suburbs Face Challenge, Costs of Satisfying Disabilities Act," *Chi. Trib.*, July 13, 1992, N.W. Sec., at 3. The same sympathies have been espoused by Mayor Rendell, who testified before the Senate Committee on Governmental Affairs that "[e]very American agrees with the goals of ADA—to ensure fair and equal access for the disabled. This is clearly a good unfunded federal mandate, but an illogical interpretation of it will have an extremely damaging effect on Philadelphia." "Unfunded Federal Mandates . . . The Philadelphia Story," *U.S. Mayor*, Nov. 15, 1993, at 12. The courts below have taken an illogical interpretation of the curb ramp mandate.

Plaintiffs below were the not-for-profit organization, Disabled in Action, and twelve individuals with ambulatory disabilities who live and work in Philadelphia. Plaintiffs brought their complaint alleging that pursuant to 28 C.F.R. § 35.151(e)(1) (1993) of the ADA regulations, the City of Philadelphia (the "City") was required to install curb ramps" when it resurfaced city streets. As noted by the district court below, "The City [of Philadelphia] [did] not dispute the importance of installing curb ramps." *Kinney v. Yerusalim*, 812 F. Supp. 547, 549 (E.D. Pa.), *aff'd*, 9 F.3d 1067 (3d Cir. 1993). Rather, the City responded that

it was not required to install such curb ramps when it resurfaced the streets. In the alternative, the City argued that the requirement, as interpreted, would be an undue burden.

The district court rejected both arguments, and held that an "undue burden" defense was not available because the streets were not an "existing facility." In a footnote, the district court recognized that it was "aware of the heavy burden this will place on the City's limited resources." *Id.* at 552 n.4. The court noted, "It is unfortunate that Congress, in enacting this type of legislation, often fails to provide the means of financing the obligations it imposes." *Id.*

Implementation of the curb ramp regulation will place a heavy burden upon this nation's cities. That is well documented. In its opinion, the district court was merely recognizing two phenomena that have been ongoing since *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) was decided: the repeal of federal revenue sharing and the plethora of new, unfunded federal mandates handed down by Congress. Both phenomena have had a substantial impact on the States and cities, and implicate traditional notions of federalism and State sovereignty as preserved by the Tenth Amendment.

This Court has long recognized the importance of the system of dual sovereignty established by our Constitution. As this Court noted more than a hundred years ago, " '[W]ithout the States in union, there could be no such political body as the United States.' " *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991) (citing *Texas v. White*, 7 Wall. 700, 725, 19 L. Ed. 227 (1869) (quoting *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L. Ed. 101 (1869))). Although not

addressed by the parties below, this Court may, in its discretion, nonetheless consider the Tenth Amendment implications raised by this litigation. As members of this Court have recently noted, "On a number of occasions, this Court has considered issues waived by the parties below and in the petition for certiorari because the issues were so integral to decision of the case that they could be considered 'fairly subsumed' by the actual questions presented." *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1658 (1991) (Stevens, J., dissenting). Because the constitutionality of the regulations at issue is a question "antecedent" to whether they have been properly interpreted, and because the constitutionality of the regulations at issue is "ultimately dispositive of the present dispute," this Court may properly consider the Tenth Amendment implications. *Id.*

The decisions below also raise issues with regard to the proper standards for interpreting federal regulations. This Court has recognized that there may be certain core areas solely within the province of local governments. Congressional activity within these areas must be viewed with circumspection and, before such Congressional activity is validated, this Court must be absolutely certain that Congress intended to intrude upon such core local government functions. Amicus Curiae contends that the ability to set priorities with regard to resurfacing or repaving city streets is such a core area, and that the district court and court of appeals below erred when broadly construing the regulations to interfere with these traditional local government functions.

I. THE JUDGMENT BELOW RAISES IMPORTANT TENTH AMENDMENT ISSUES.

A. The Judgment Below Demonstrates That *Garcia* Can No Longer Be Regarded As Good Law.

1. The Reasoning in *Garcia* Is Now Flawed Because Congress Ended General Federal Revenue Sharing and Congress Is Now Appropriating Local Tax Funds to Achieve Federal Mandates.

This Court has stated that "the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result. Any substantive restraint on the exercise of the Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy.' " *Garcia*, 469 U.S. at 554 (citation omitted). This limitation may have once been adequate, but circumstances have changed so dramatically since *Garcia* that States are now vulnerable.

The majority decision in *Garcia* was written in the context of a different political and fiscal scheme. When this Court decreed an appropriate process was sufficient protection for the States' sovereignty, it did so in light of the existence of substantial federal funding to support Congressional mandates. In 1985, the federal government was still engaged in general revenue sharing. Thus, even if States had different priorities than Congress, federal mandates were less consequential because Congress paid for them. This Court itself stressed in *Garcia* that "federal grants

. . . account for about one-fifth of state and local government expenditures," and that "[t]he States . . . obtained federal funding for such services as police and fire protection, education, public health and hospitals, parks and recreation, and sanitation." 469 U.S. at 552-53.

In 1986, the federal government abruptly discontinued its practice of general revenue sharing. But it did not discontinue its practice of issuing federal mandates. Congress effectively shifted to the States and cities the burden of funding federal programs. In this context, the protections afforded by process have taken on an entirely new dimension. Today, if a State's or city's priorities do not accord with a federal mandate, the State or locality's sovereign right to establish those priorities is preempted—the local government is required to implement the federal program using its own monies that it might prefer to devote to other priorities. Thus, "failings in the national political process" now have unprecedented detrimental consequences on local revenues—local revenues raised to pave streets and build new roads, fight crime, fight fires, build schools and libraries, shelter the homeless, provide general relief, and operate courts, among other basic operations.

2. *Garcia* Is No Protection Because the Political Process Is Failing.

Despite repeated pleas to federal lawmakers for relief from unfunded federal mandates, no relief has been forthcoming. Many observers have noted that "federal lawmakers seem unwilling to confront voters with the true costs of public policy." *See, e.g.*, Diemer, *supra*. Moreover, while legislation has been introduced to limit unfunded federal mandates, S. 993 in-

troduced by Senator Dirk Kempthorne (R-Idaho), and H.R. 140 introduced by Representative Gary Condit (D-Cal.), "unfunded mandates have never been a hot button on Capitol Hill." *See* Diemer, *supra*, at 5A.[1]

The way the process works guarantees that it will fail. Congress is allowed to satisfy special interest lobbies with mandate legislation, but it is able to avoid political responsibility for the inevitable tax hikes caused by its legislation. As Senator Kempthorne noted, "Congress gets the credit. Local officials get the tab." McCarty, *supra*, at 6.

By continuing to pass unfunded federal mandates, but discontinuing federal general revenue sharing, Congress has taken advantage of the protections afforded to it by the majority in *Garcia*. This Court has recognized that Congress may " 'attach conditions on the receipt of federal funds,' " *see New York v. United States*, 112 S. Ct. 2408, 2423 (1992) (citation omitted), and may "offer States the choice of regulating [an] activity according to federal standards or having state law pre-empted by federal regulation." *Id.* at 2424. This Court has further recognized that both methods are permissible because "[i]f a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant. If state residents would prefer their government to devote its attention and resources to prob-

[1] This phenomenon is clearly demonstrated by reviewing the number of members lending support to the Kempthorne and Condit bills. Out of the 51 co-sponsors to Senator Kempthorne's bill, only 13 are Democrats. Similarly, out of the 132 co-sponsors to Representative Condit's bill, only 53 are Democrats. Without substantial Democratic support for such legislation, passage of any bill is problematic.

lems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program, and they may continue to supplement that program to the extent state law is not preempted." *Id.*

However, without federal general revenue sharing, State residents no longer have a choice. They can no longer elect to have the "Federal Government rather than the State bear the expense of a federally mandated regulatory program . . . ." *Id.* Congress, by enacting numerous unfunded federal mandates such as the ADA and the Residential Lead-Based Paint Hazard Reduction Act, has taken advantage of the procedural protections afforded in *Garcia*. The majority in *Garcia* made the seemingly logical assumption that, because the federal government had a "role in assisting state and local governments," procedural protections were sufficient. Once the federal government discontinued revenue sharing, undermining that assumption, it undermined the basis for *Garcia*.[2] While the federal role in assisting State and local governments has been dramatically diminished, Congress has hidden behind the protections of *Garcia* in usurping local sovereignty.

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[2] The flaw in this assumption was foreshadowed by Justice Powell in his dissent in *Garcia*. Justice Powell noted, "The Court believes that the significant financial assistance afforded the States and localities by the Federal Government is relevant to the constitutionality of extending Commerce Clause enactments to the States. . . . Regardless of the willingness of the Federal Government to provide federal aid, the constitutional question remains the same: whether the federal statute violates the sovereign powers reserved to the States by the Tenth Amendment." *Garcia*, 469 U.S. at 566 n.10.

The opinions of the courts below also demonstrate that the political process is failing. As Justice Powell noted in his dissent in *Garcia*, "The Framers recognized that the most effective democracy occurs at local levels of government, where people with first-hand knowledge of local problems have more ready access to public officials responsible for dealing with them." 469 U.S. at 575 n.18. Justice Powell further noted that "members of the immense federal bureaucracy are not elected, know less about the services traditionally rendered by States and localities, and are inevitably less responsive to recipients of such services, than are state legislatures, city councils, boards of supervisors, and state and local commissions, boards, and agencies. It is at these state and local levels—not in Washington as the Court so mistakenly thinks—that 'democratic self-government' is best exemplified." *Id.* at 577.

The decisions of the district court and the court of appeals below in effect obstruct this notion of "democratic self-government" by ordering localities to install curb ramps with local revenues and ordering them to defer other competing street repaving priorities determined by local government officials. In setting forth the regulations regarding a "transition plan," the Department of Justice encouraged public entities to "provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the development of the transition plan by submitting comments." *See* 28 C.F.R. § 35.150(d)(1) (1993). The City of Philadelphia did just that and, as a result, established a transition plan reflecting the priorities and viewpoints of its citizens.

In its brief before the court of appeals, the City argued that its transition plan, which not only complies with the timetable set forth in the regulations, but which also reflects the priorities and needs of the City's citizenry, should govern when curb ramps are installed. The court of appeals addressed this argument in a footnote, stating that "[t]he City also contends that the ADA and the regulations must allow a local government to set its own priorities as to which streets will have curb cuts installed first." *Kinney v. Yerusalim*, 9 F.3d 1067, 1072 n.4 (3d Cir. 1993). While the court appears sympathetic to the City's position, it eventually concludes that "[n]evertheless, we cannot rewrite the plain language of the regulations." *Id.* The court further explained, "if, as we find below, a resurfacing is an alteration, curb cuts *must* be installed no matter what other priorities the transition plan may call for." *Id.* (emphasis added).

This argument cannot and should not be disregarded. As noted by the City in its Petition for Writ of Certiorari, "The crucial question is . . . whether the City may continue to adhere to its transition plan . . . ." or whether, consistent with the rationale of the courts below, the City will be forced to install "curb cuts whenever a street is resurfaced without regard to the priorities which the transition plan establish[ed] . . . ." Petition at 15. The City argues that "the only correct answer is that the City's transition plan" must govern the installation of such curb cuts. *Id.* The courts below reach a contrary result.

More importantly, the courts below, in effect, transfer the power to make local decisions from local and State governments to the "immense federal bureauc-

racy." Two results inevitably emerge when this type of transfer occurs. The first is that local and State governments become less responsive to local concerns. "Local concerns that exist are best handled by local government. . . . If the states are sapped of their energy and internal integrity by federal directives and federal tasks, the government bodies will not be able to respond effectively to the local issues consigned to them." Joseph Lipner, "Imposing Federal Business on Officers of the States: What the Tenth Amendment Might Mean," 57 Geo. Wash. L. Rev. 907, 928 (1989).

The second result is that political accountability is diminished. As Justice Powell explained in his dissent in *Garcia*:

> Federal departments and agencies customarily are authorized to write regulations. . . . As is true of the original legislation, these are drafted largely by staff personnel. . . . These employees may have little or no knowledge of the States and localities that will be affected by the statutes and regulations for which they are responsible. In any case, they hardly are as accessible and responsive as those who occupy analogous positions in state and local governments.

469 U.S. at 576-77. Based on this reasoning, Justice Powell argued that it was disingenuous to think that the political process could protect States. How could it when those creating the law are unaccountable?

3. The Protections Created by This Court in *Garcia* Are Currently Inadequate; Therefore, This Court Must Assert Itself by Rewriting Those Protections to Protect the States From Congressional Mandates Such as the Curb Ramp Mandate Under the ADA.

Members of this Court have long recognized that "state sovereignty is a fundamental component of our system of government." *Garcia*, 469 U.S. at 573 (Powell, J., dissenting). This Court has defined its own role in policing the Tenth Amendment. "[J]udicial enforcement of the Tenth Amendment is essential to maintaining the federal system so carefully designed by the Framers and adopted in the Constitution." *Id.* at 570. This Court has also defined Congress's role vis-a-vis the Tenth Amendment: "While the Tenth Amendment has been characterized as a 'truism,' stating merely that 'all is retained which has not been surrendered,' . . . it is not without significance. The Amendment expressly declares the constitutional policy that *Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." Fry v. United States*, 421 U.S. 542, 547 n.7 (1975) (emphasis added) (citation omitted). By enacting the ADA but not providing federal funds to implement its mandates, Congress has impaired the States' and cities' abilities to function effectively.

B. Congress Has Gone Beyond Its Authority In "Commandeering the States."

Congress enacted the ADA pursuant to its authority under the Commerce Clause. In the purpose section of the Act, Congress stated that it was invoking "the sweep of congressional authority, including the

power to enforce the fourteenth amendment and to regulate commerce . . . ." 42 U.S.C. § 12101(b)(4) (Supp. III 1992). There is no doubt that Congress's powers are vast. Pursuant to its spending powers, " 'Congress may attach conditions on the receipt of federal funds.' " *New York*, 112 S. Ct. at 2423. Moreover, "Congress has the authority to regulate private activity under the Commerce Clause." *Id.* at 2424. While Congress's powers under the Commerce Clause are plenary, *see National League of Cities v. Usery*, 426 U.S. 833, 840 (1976), they are not without limit. The Tenth Amendment limits those powers: "[T]he Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *New York*, 112 S. Ct. at 2418.[3]

This Court has repeatedly defined the nature of these Tenth Amendment limits. This Court has held, "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate." *New York*, 112 S. Ct. at 2429. Nor can Congress "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981). And, while the nature of these limits has at

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[3] Congress's authority pursuant to the Fourteenth Amendment is similarly not without limit. "[T]he Fourteenth Amendment does not override all principles of federalism." *Gregory*, 111 S. Ct. at 2405. "[T]his Court has never held that the [Fourteenth] Amendment may be applied in complete disregard for a State's constitutional powers." *Id.*

times seemed unclear, this Court has found, "Whatever the outer limits of [the Federal Government's] sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program." *New York*, 112 S. Ct. at 2435.

The case below presents a clear of example of Congress compelling the City of Philadelphia to administer the ADA. As the court of appeals noted, Congress advised the Department of Justice to follow the mandates of the Rehabilitation Act of 1973 when promulgating the regulations under the ADA. However, the Rehabilitation Act was enacted to prohibit discrimination on the basis of handicap in *federally assisted programs and activities.*

It is beyond argument that Congress may attach conditions to the receipt of federal funds. However, the Department of Justice in promulgating the rules of the ADA recognized that the prohibitions of the Rehabilitation Act were being extended to *all* activities of State and local governments, *including those that do not receive federal financial assistance.* The Department of Justice has admitted that this is not a matter of tied funding. Rather, it is a mandate to the States and localities to implement these regulations—regardless of where the funds to accomplish it are derived. Congress and the Department of Justice are using State and local bodies as "field offices of the national bureaucracy." *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 777 (1982).

The funding for the curb ramp mandate and other ADA-related mandates will come from State and local coffers, which will place severe restraints on already tight budgets. This Court has held that determining

whether the Tenth Amendment has been violated involves an inquiry "into the direct and obvious effect of the federal legislation on the ability of the States to allocate their resources." *EEOC v. Wyoming*, 460 U.S. 226, 240 (1983). The multimillion-dollar burden of the curb ramp requirement obviously will negatively impact on the State and local governments' abilities to allocate their resources.

The Department of Justice itself seemingly has recognized this Tenth Amendment dilemma, and has prepared a statement regarding the federalism impact of the ADA rules. *See* 56 Fed. Reg. 35,694 (1991) (referencing Statement Concerning Federalism Impact (the "Statement"), available from the Department of Justice). In its two-and-a-half page Statement, the Department of Justice explained that, "in drafting [the Title II regulations] [it] has taken care to avoid options that would infringe on the principles of federalism." Statement at 2.

In taking care to avoid such options, the Department "conducted a review of the statute books of every State to identify existing requirements relating to treatment of individuals with disabilities." *Id.* The Department discovered that "[e]very State was found to have at least one or more laws addressing the rights of individuals with disabilities." *Id.* After reviewing these various State statutes, the Department concluded that "most of requirements established by [the Title II regulations] merely duplicate the requirements of existing State and Federal Laws." *Id.* at 3. The Department then perfunctorily noted, "Thus, the [regulations] will not impose substantial additional requirements." *Id.*

The Department of Justice's review of the federalism impact of these rules was misguided and disingenuous. The Department incorrectly assumed that, because there were already State laws regarding the disabled, the Title II regulations would pose no additional burden. This is far from true. If the Department of Justice had seen fit to conduct a budgetary study regarding the fiscal impact of the Title II regulations, it would have discovered that the regulations would indeed "impose substantial additional requirements."

II. THE COURTS BELOW SHOULD ADOPT A STRICT INTERPRETATION OF THE REGULATIONS PURSUANT TO THE PLAIN STATEMENT RULE—UNLESS CONGRESS INTENDED TO PREEMPT, IT SHOULD NOT BE FOUND TO HAVE DONE SO.

James Madison noted that there may be certain "core areas" solely within the province of the States. In The Federalist No. 45, he explained, "The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State," *cited in Garcia*, 469 U.S. at 570-71 (Powell, J. dissenting). Justice Day reiterated this concept more than 75 years ago when he stated, "The power of the states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government." *Hammer v. Dagenhart*, 247 U.S. 251, 275 (1918). This Court has held that to give State-displacing weight to federal law and preempt the historic powers of the States, "we must be absolutely certain that Congress intended such an exercise." *Gregory*, 111 S. Ct. at 2403.

Members of this Court have recognized that "maintaining streets" is a "classic example of the type of service traditionally provided by local government." *Garcia*, 469 U.S. at 578 (Powell, J., dissenting). Because the maintenance of city streets has long been recognized as a "purely internal affair," the courts below should have construed the regulations strictly, so as not to infringe upon the ability of local governments to govern themselves. However, the courts below construed the regulations broadly, so that Congress's mandate completely usurped a traditional government function.

CONCLUSION

The time has come for this Court to "again assume its constitutional responsibility." *Garcia*, 469 U.S. at 589 (O'Connor, J., dissenting). The regulations at issue herein are a perfect example of the unfunded federal mandates that have deluged our cities and States. The outcome of this case will affect not only Philadelphia, but all of this nation's cities. Moreover, the outcome may have a significant impact on the validity of other unfunded federal mandates. This issue must be addressed now. "If Congress is allowed gratuitously to order the states to perform federal tasks, it will not have to pay for what it gets. As ideas for federal projects grow but resources lessen, the incentives will grow stronger for Congress to command the state government to perform the federal programs for free." Lipner, *supra*, at 929.

As Professor Tribe has noted and this Court has recognized, "Of course, no one expects Congress to obliterate the states, at least in one fell swoop. If there is any danger, it lies in the tyranny of small

decisions—in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell." Lawrence Tribe, *American Constitutional Law* § 5-20, at 381 (2d ed. 1988). This Court has recognized that it "has a continuing responsibility 'to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States.' " *See South Carolina v. Baker*, 485 U.S. 505, 531 (1988) (quoting *Garcia*, 469 U.S. at 581) (O'Connor, J., dissenting). Amicus Curiae respectfully requests this Court again to recognize its responsibility and "not cast its lot with those who disbelieve in federalism and think that no steps should be taken to protect it." Lipner, *supra*, at 941.

For the reasons set forth above, the petition should be granted.

Respectfully submitted,

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